**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 29691**

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| **STATE OF IDAHO,** | ) | |
| | ) | **2005 Opinion No. 23** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **Filed: April 8, 2005** |
| **v.** | ) | |
| | ) | **Stephen W. Kenyon, Clerk** |
| **JOHN M. COPE,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

Appeal from the District Court of the Second Judicial District, State of Idaho, Nez Perce County. Hon. Carl B. Kerrick, District Judge.

Determinate life sentence for second degree murder, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric Don Fredericksen, Deputy Appellate Public Defender, Boise, for appellant. Eric Don Fredericksen argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica Marie Lorello, Deputy Attorney General, Boise, for respondent. Jessica Marie Lorello argued.

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LANSING, Judge

John M. Cope challenges the sentence imposed upon him after he pleaded guilty to second degree murder. Cope contends that the district court erred by allowing the report of Cope's mental competency evaluation to be included in the presentence investigation report and by allowing the psychologist who conducted the competency evaluation to testify at the sentencing hearing. Cope also argues that the district court imposed an excessive sentence.

## I.
## FACTUAL AND PROCEDURAL BACKGROUND

Cope murdered Brian Elliot by decapitating him with a knife, and then mutilated the severed head. After killing Mr. Elliot, Cope went to a hospital emergency room because he had cut his hand during the attack. At the hospital Cope appeared to be psychotic. He spoke of "letting the beast out" and told the hospital staff that his name was "Dump Truck." Cope was

admitted to the psychiatric ward, and the police, who had already discovered Mr. Elliot's body, were summoned. During an interview with officers, Cope said that he was being "tormented by the mark of the beast" and that he had cut off the beast's head with a knife.

Cope was charged with first degree murder, Idaho Code §§ 18-4001, 18-4003, and the State sought a sentencing enhancement for use of a deadly weapon pursuant to I.C. § 19-2520. The magistrate court ordered a psychological evaluation pursuant to I.C. § 18-211 to determine whether Cope was competent to assist in his own defense and to stand trial. A psychologist who was initially appointed for this purpose reported that he was unable to complete the evaluation due to Cope's unwillingness to participate. The magistrate then ordered that Cope be confined at the Idaho Secured Medical Facility (ISMF) for completion of a competency evaluation as authorized by I.C. § 18-211(3). Psychologist Chad Sombke was appointed to conduct the evaluation. Dr. Sombke's preliminary evaluation reported that Cope was unfit to proceed and needed to be "fully evaluated and treated." Four months later, Dr. Sombke submitted a report concluding that, after four months of treatment and observation, Cope was now able to stand trial and assist with his defense. Relying on Dr. Sombke's report, the magistrate found Cope competent and ordered that he be bound over to the district court.

Cope thereafter entered into a plea agreement with the State by which he agreed to plead guilty to a reduced charge of second degree murder and the State agreed to withdraw its request for a sentence enhancement. The written plea agreement also included the following waiver of Cope's right to appeal: "Unless the plea is rejected or withdrawn, the Defendant hereby gives up any and all motions, defenses, objections, appeals, or requests that defendant has made or raised or could have served hereafter to or against any matters preceding the court's entry of judgment and imposition of sentence." The district court accepted Cope's guilty plea and ordered the preparation of a presentence investigation report (PSI).

The State thereafter filed a motion asking that the presentence investigator be allowed to review Dr. Sombke's competency evaluation report. Cope opposed the motion, arguing that I.C. § 18-215[1] prohibited the use of Dr. Sombke's report in the criminal proceeding for any purpose

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[1] Idaho Code § 18-215 provides:

> A statement made by a person subjected to psychiatric or psychological examination or treatment pursuant to sections 18-211, 18-212 or 19-2522, Idaho Code, for the purposes of such examination or treatment shall not be admissible in

other than determination of competence. The district court concluded, however, that the statute did not prohibit consideration of the competency report for purposes of sentencing and therefore granted the State's motion.

At the sentencing hearing, the State called Dr. Sombke to testify. Cope again objected on the basis of I.C. § 18-215, but the district court overruled the objection. Dr. Sombke then testified about statements that Cope had made during the competency evaluation as well as opinions that Dr. Sombke formed from his interactions with Cope during Cope's commitment at ISMF. The district court sentenced Cope to a fixed life term of imprisonment. Cope thereafter filed a motion for reduction of the sentence, which the court denied.

On appeal, Cope contends that the district court erred by admitting the competency evaluation report into evidence at sentencing as part of the PSI and by allowing Dr. Sombke to testify at the sentencing hearing. Cope also contends that the district court abused its discretion by imposing an excessive sentence.

## II.
## ANALYSIS

### A. Waiver of Right to Appeal Use of Competency Evaluation Report and Dr. Sombke's Testimony at Sentencing

Cope contends that the admission for sentencing purposes of Dr. Sombke's report and his testimony, disclosing statements made by Cope during the court-ordered competency evaluation, violated I.C. § 18-215 and infringed his Fifth Amendment right against self-incrimination.

In response, the State argues that Cope has no right to appellate review of these issues because his plea agreement included a waiver of his right to appeal anything that occurred in his criminal proceeding prior to the imposition of sentence. The State asserts that, with the exception of Cope's claim of an excessive sentence, the issues he asserts on appeal have been

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> evidence in any criminal proceeding against him on any issue other than the defendant's ability to assist counsel at trial or to form any specific intent which is an element of the crime charged, except that such statements of a defendant to a psychiatrist or psychologist as are relevant for impeachment purposes may be received subject to the usual rules of evidence governing matters of impeachment.

waived. Cope contends, however, that a defendant cannot knowingly and voluntarily waive the right to appeal errors of which he or she could have no knowledge because they have not yet occurred. Cope also maintains that his waiver is invalid because neither the court nor either party mentioned it during the change of plea hearing and, at one point, the district court advised Cope that he had a right to appeal.

A plea agreement is contractual in nature and generally must be measured by contract law standards. *State v. Holdaway*, 130 Idaho 482, 484, 943 P.2d 72, 74 (Ct. App. 1997); *State v. Claxton*, 128 Idaho 782, 785, 918 P.2d 1227, 1230 (Ct. App. 1996). Both the prosecutor and the defendant are bound by the terms of the agreement and are correspondingly entitled to receive the benefits for which they bargained. *Holdaway*, 130 Idaho at 484, 943 P.2d at 74; *State v. Armstrong*, 127 Idaho 666, 668, 904 P.2d 578, 580 (Ct. App. 1995). Consequently, a defendant will not ordinarily be allowed to retain the benefits of a plea agreement while at the same time disclaiming its provisions that benefit the State. *Id.*

It is clear that Idaho law permits the waiver of the right of appeal as a term of a plea bargain. Idaho Criminal Rule 11(d)(1) specifically provides that a plea agreement "may include a waiver of the defendant's right to appeal the judgment and sentence of the court," and in *State v. Murphy*, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994), the Idaho Supreme Court upheld the validity of such a waiver against an argument that it should be deemed void as against public policy. The *Murphy* Court held that a waiver of the right to appellate review is enforceable as long as the record shows that it was voluntarily, knowingly, and intelligently made. *Murphy*, 125 Idaho at 457, 872 P.2d at 720. That is, it is subject to the same analysis that would be employed in determining the validity of any guilty plea. *Id.*

Cope did not move in the district court to withdraw his guilty plea, and the record before us includes no evidence that Cope did not, in fact, understand the waiver of his appellate rights when he pleaded guilty. Rather, Cope asks us to hold that, as a matter of law, the record is insufficient to show that Cope's waiver of his right of appeal was knowing, intelligent and voluntary.

At Cope's change of the plea hearing, the district court did not explicitly discuss with Cope the waiver of appellate rights in his plea agreement. Although such a dialogue certainly would be preferred, we conclude that it is not a prerequisite to the validity of the waiver. Idaho Criminal Rule 11(c), which governs the acceptance of guilty pleas, requires the trial court to advise the defendants that a guilty plea will waive certain enumerated rights but does not require such a colloquy with respect to a waiver of the right of appeal. In our view, direct discussion of the waiver is not essential if the record otherwise demonstrates that the defendant was aware of and understood that the waiver was one of the terms of the plea agreement. Our conclusion is consistent with those of numerous federal courts which have held that an express warning from the court concerning such a waiver is not essential to its validity. *See United States v. Black*, 201 F.3d 1296, 1301-02 (10th Cir. 2000); *United States v. Michelsen*, 141 F.3d 867, 871-72 (8th Cir. 1998); *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995); *United States v. Portillo*, 18 F.3d 290, 292-93 (5th Cir. 1994); *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992).[2]

Cope argues, however, that even if a defendant waiving the right to appeal may properly be deemed to have foregone an appellate challenge to the length of any sentence imposed, because the risk of an excessive sentence is foreseeable, the waiver should not bar Cope's appeal because the error of which he complains, the alleged admission of evidence at the sentencing hearing in violation of I.C. § 18-215, could not have been foreseen and therefore could not have been knowingly waived. Although this argument has not been directly addressed in an Idaho appellate opinion, it appears to be at odds with the express proviso of I.C.R. 11(d)(1) referenced above; and other courts have rejected the argument that defendants cannot knowingly and voluntarily waive appellate review of unforeseeable errors. For example, in *United States v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001), the court commented:

> [A]t the time the defendant signs the plea agreement, she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her. Her waiver typically embraces all determinations later made by the sentencing court--some of which may never have occurred either to her or to the government, and some of which may be quite different than either thought possible.

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[2] Subsequent to these decisions, a 1999 amendment to Federal Rule of Civil Procedure 11(b)(1)(N) added a requirement that a waiver of the right to appeal be addressed by federal courts at the change of plea hearing.

Likewise, in *United States v. Khattak*, 273 F.3d 557, 566 (3rd Cir. 2001), the court rejected an argument that a waiver-of-appeal provision is void as contrary to public policy because defendants cannot ever knowingly and voluntarily waive their rights to appeal future errors. Other cases upholding the validity of a waiver of appellate rights in the face of errors that could not have been anticipated include *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001); *Black*, 201 F.3d 1296; *United States v. Hernandez*, 134 F.3d 1435 (10th Cir. 1998); and *Wenger*, 58 F.3d 280.

In the present case, the claimed error is the admission of evidence through the PSI and testimony at the sentencing hearing. While the use of this particular evidence may not have been predictable, when Cope entered into his plea agreement it was certainly foreseeable that the court might make evidentiary rulings at the sentencing hearing with which Cope would disagree. We conclude that the occurrence of an alleged error that Cope could not have predicted with specificity does not enable him to avoid the bargained-for waiver of his right to appeal.

Cope also argues that his guilty plea was not "knowing" with respect to the waiver because the district court not only failed to discuss the waiver during the plea colloquy but told Cope, "You have a right to appeal any final and appealable decision I make." The State responds that the court's statement did not actually contradict the waiver in the plea agreement. The State points out that because the written waiver only applied to the appeal of any claim of error "*preceding* the court's entry of judgment and imposition of sentence," it preserved Cope's right to challenge the sentence itself on appeal, and therefore the judge's statement that Cope retained the right to appeal "any final and appealable decision," was accurate.

In our view, the question whether the court's statement was inconsistent with the plea agreement is not dispositive, for even if the statement was misleading, it could not have affected the knowing, voluntary and intelligent nature of the waiver in the plea agreement that had been reviewed and signed *before* the court's comment was made. The transcript of the hearing shows that the plea agreement had been negotiated, drafted, reviewed by Cope with counsel, and signed by him, before the trial court's statement regarding Cope's opportunity to appeal. The court's later comment could not retrospectively affect Cope's understanding of an agreement to which he had already assented. We note that nearly all federal circuit courts that have addressed this issue have held that a trial court's act of incorrectly informing a defendant of the right to appeal, in conflict with a waiver of appellate review in the plea agreement, has no effect on the validity

of the waiver. *See United States v. Fleming*, 239 F.3d 761, 765 (6th Cir. 2001); *United States v. Fisher*, 232 F.3d 301, 303-04 (2nd Cir. 2000); *United States v. Atterberry*, 144 F.3d 1299, 1301 (10th Cir. 1998); *Michelsen*, 141 F.3d at 872-73; *United States v. Ogden*, 102 F.3d 887, 888-89 (7th Cir. 1996); *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). The Ninth Circuit Court of Appeals stands alone in holding that a court's oral reference to the right to appeal will trump a defendant's waiver of that right in a plea agreement. *See United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995).

The record here demonstrates that Cope voluntarily and knowingly waived the right of appeal in his plea agreement. The written plea agreement was prepared by Cope's counsel and was signed by Cope in open court. Before accepting Cope's guilty plea, the district court engaged in the following exchange to ascertain whether Cope was aware of the terms and conditions of the agreement:

> THE COURT: Then at this time, [defense counsel], do you need time then to review the Rule 11[3] agreement?
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> DEFENSE COUNSEL: Your Honor, I have been through the Rule 11 agreement in some detail with Mr. Cope and I believe that he is prepared to sign that at this time. And I just wanted him to do that in open court.
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> THE COURT: Alright. Thank you. And, Mr. Cope, have you had an opportunity to read through that Rule 11 agreement?
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> THE DEFENDANT: Yes, sir. Yes, I have, Your Honor.
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> THE COURT: And have you had a sufficient opportunity to talk to [defense counsel] about that Rule 11 agreement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you want to take any more time at all right now and speak to them further before you enter your signature on the agreement?
>
> THE DEFENDANT: No, Your Honor.

The court ultimately accepted Cope's guilty plea, finding that it was made freely, knowingly, and voluntarily. The record supports that determination. Accordingly, we hold that Cope has waived his right to appellate review of the possible violation of I.C. § 18-215 by the admission of Dr. Sombke's testimony and written report at the sentencing hearing.

By this holding we do not suggest that a waiver of appeal rights in a plea agreement will insulate from appellate examination every variety of error that might thereafter occur in the criminal proceeding. For example, such a waiver might not prevent appellate review if a prosecutor subsequently either breached the plea agreement or engaged in other misconduct, or if

the trial court imposed a sentence that exceeded the statutory maximum. Here, however, even if the prosecution's proffer of Dr. Sombke's report and associated testimony was based on a misinterpretation of I.C. § 18-215[4] and should have been disallowed, it did not rise to the level of misconduct that would relieve Cope of his obligation to comply with the terms of the plea bargain.

Lastly, Cope contends that the use at the sentencing hearing of his statements made during the competency evaluation violates his Fifth Amendment privilege against self-incrimination. He claims support for this proposition from *Estelle v. Smith*, 451 U.S. 454 (1981). Cope contends that even if the waiver in his plea agreement is otherwise valid, it cannot be effective to waive his Fifth Amendment rights. We do not reach this issue, however, because even if a waiver of appellate review would be ineffective as to constitutional violations, Cope's claim of a Fifth Amendment violation would still not be reviewable by this Court as it was not raised in the court below. In objecting to the use of Dr. Sombke's report and testimony, Cope did not assert that the evidence would violate his Fifth Amendment rights. Generally, issues not raised below will not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Because Cope did not preserve this issue for appeal, we do not address it.

**B. Sentence**

Cope also contends that the district court abused its discretion by imposing a fixed life sentence. The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender and punishment or retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In examining the reasonableness of a sentence, we conduct an independent review of the record, focusing on the nature of the offense and the character of the offender. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). We will find that the trial court abused its discretion in sentencing only if the defendant, in light of the objectives of sentencing, shows

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[3] The reference is to Idaho Criminal Rule 11.

[4] Based on our disposition of the waiver issue, we need not address the parties' dispute as to the interpretation of I.C. § 18-215.

that his sentence was excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). Because sentencing decisions involve consideration of many intangibles and cannot be made with precision, where reasonable minds might differ as to the propriety of the term of confinement, the discretion vested in the sentencing court will be respected. *Toohill*, 103 Idaho at 568, 650 P.2d at 710.

While recognizing that Cope's crime was the product of his mental illness, we nevertheless conclude that the sentence imposed by the district court was reasonable. Before the commission of this crime, Cope had been institutionalized in an Idaho mental hospital three times within a one-year period, and he had been previously hospitalized on a number of occasions in California. His mental health records are replete with instances of Cope's noncompliance with medically ordered mental health treatment. There is a sustained pattern of hospitalization followed by failure to follow a prescribed medication regimen upon discharge, with a resulting psychotic, aggressive episode that leads to another hospitalization. Even if Cope is not aggressive or dangerous when properly medicated, his history shows no basis to believe that he would comply with medication requirements when not institutionalized.

Aside from a history of noncompliance with mental health treatment, Cope has a history of alcohol abuse, which exacerbates his illness and for which he has refused to obtain treatment. He also has a significant criminal history, including crimes of violence. Cope's own mental health expert testified that even with continuous medication, Cope would remain a danger to the public.

Cope poses a grave danger to others should he ever be released from prison. Accordingly, in light of the primary goal of sentencing--the protection of society--we cannot say that the district court abused its discretion in imposing a fixed life sentence.

## III.

## CONCLUSION

By his plea agreement Cope waived the right to appellate review of the district court's admission of challenged evidence for sentencing purposes. Therefore, we do not review that claim of error on appeal. The fixed life sentence imposed on Cope does not represent an abuse of the district court's discretion. Therefore, the sentence is affirmed.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**